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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte MARK S. ZSCHOCKE and DANIEL C. WILSON

Appeal 2017–000025
Application 12/697,842
Technology Center 3600

Before ANTON W. FETTING, PHILIP J. HOFFMANN, and MATTHEW S. MEYERS, *Administrative Patent Judges.*

FETTING, *Administrative Patent Judge.*

DECISION ON APPEAL

STATEMENT OF THE CASE[1]

Mark S. Zschocke and Daniel C. Wilson (Appellants) seek review under 35 U.S.C. § 134 of a final rejection of claims 1–32 and 59–62, the only claims pending in the application on appeal. We have jurisdiction over the appeal pursuant to 35 U.S.C. § 6(b).

The Appellants invented a way to auction targeted advertising media delivery opportunities to asset providers. Specification 1:14–16.

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[1] Our decision will make reference to the Appellants' Appeal Brief ("App. Br.," filed February 16, 2016) and Reply Brief ("Reply Br.," filed September

An understanding of the invention can be derived from a reading of exemplary claim 1, which is reproduced below (bracketed matter and some paragraphing added).

> 1. A system for auctioning asset delivery options in a broadcast network, the broadcast network primarily involving synchronized distribution of broadcast content to an aggregate audience of target users, said system comprising:
>
> [1] a traffic interface for receiving information regarding said aggregate audience,
>
> wherein said information comprises one or more classification parameters associated with individual ones of said target users of said aggregate audience;
>
> [2] a user interface for receiving, from each of a plurality of asset providers,
>
> an identification of at least one asset for distribution within a specific broadcast content of said broadcast network,
>
> one or more targeting parameters associated with each said asset,
>
> and
>
> a value per impression for one or more segments of said aggregate audience,
>
> wherein each said classification parameter and each said targeting parameter identifies one of said segments of said aggregate audience;
>
> and
>
> a processor, said processor having logic for:

15, 2016), and the Examiner's Answer ("Ans.," mailed July 15, 2016) and Final Action ("Final Act.," mailed February 17, 2015).

[3] determining,

from a set of defined auctioning models where each of the auctioning models has a different set of rules for identifying a winning bid and an asset delivery price for the winning bid,

a first auctioning model for auctioning a first asset delivery option

and

a second auctioning model for auctioning a second asset delivery option;

and

[4] auctioning said first asset delivery option via said first auctioning model and said second asset delivery option via said second auctioning model

such that first and second winning bids are identified for each of said first and second asset delivery options for delivery in connection with a single asset delivery opportunity,

wherein said second auctioning model is at least partially based on said identified first winning bid of said first asset delivery option.

The Examiner relies upon the following prior art:

Bykowsky	US 2002/0013757 A1	Jan. 31, 2002
Bronnimann	US 2004/0044571 A1	Mar. 4, 2004
Siler	US 2004/0133467 A1	July 8, 2004
Sandholm	US 2006/0224496 A1	Oct. 5, 2006

Claims 1–32 and 59–62 stand rejected under 35 U.S.C. § 101 as directed to non–statutory subject matter.

Claims 1 and 21 stand rejected under 35 U.S.C. § 112, second paragraph, as failing to particularly point out and distinctly claim the invention.

Claims 1–16, 18–32, and 59 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Bykowsky and Sandholm.

Claim 17 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Bykowsky, Sandholm, and Bronnimann.

Claims 60–62 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Bykowsky, Sandholm, and Siler.

ISSUES

The issues of statutory subject matter turn primarily on whether the claims are directed to more than the selection of advertising by auctions. The issues of indefiniteness turn primarily on whether one of ordinary skill would understand the metes and bounds of the claims. The issues of obviousness turn primarily on whether the art applied describes a second auctioning model being at least partially based on an identified first winning bid.

FACTS PERTINENT TO THE ISSUES

The following enumerated Findings of Fact (FF) are believed to be supported by a preponderance of the evidence.

Facts Related to the Prior Art

Bykowsky

01. Bykowsky is directed to an automated exchange and method for assigning advertising time and space, and, more specifically, to an electronic auction and method which determines, using complex mathematical algorithms, an efficient assignment of heterogeneous items from sellers to buyers and a set of transaction prices for such items, based upon "single-item" and "multiple-item" bids and offers. Bykowsky para. 1.

Sandholm

02. Sandholm is directed to expressive auctions for the allocation of differentiated supply in dynamic environments with uncertainty about future supply and future demand. Sandholm para. 2.

ANALYSIS

Claims 1–32 and 59–62 rejected under 35 U.S.C. § 101 as directed to non–statutory subject matter

We agree with and adopt the Examiner's findings that independent claim 21 is directed to auctioning asset delivery options for advertising use which is a fundamental business practice. Final Act. 3–4. Both auctions and advertising are notoriously old practices in commerce. We further agree with and adopt the Examiner's findings that the individual limitations, taken separately and as an ordered combination do not add more to create a creative concept. Final Act. 4–5.

We are not persuaded by Appellants' argument that the invention is limited to a narrow context. App. Br. 7. That the claim does not preempt all forms of the abstraction or may be limited to the abstract idea in a particular setting do not make them any less abstract. *See OIP Technologies, Inc. v. Amazon.com, Inc.*, 788 F.3d 1359, 1360–1361 (2015).

We are not persuaded by Appellants' argument that the claim is analogous to that in *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1257 (Fed. Cir. 2014), where the Court noted that a claim may amount to more than any abstract idea recited in the claims when it addresses a business challenge, such as "retaining website visitors," where that challenge is particular to a specific technological environment, such as the Internet. Appellants contend that the claim addresses a business challenge of auctioning assets in a broadcast network unique to parallel distribution of targeted advertisements in the broadcast network. App. Br. 8.

In *DDR*, the court stated that "the [] patent's claims address the problem of retaining website visitors that, if adhering to the routine, conventional functioning of Internet hyperlink protocol, would be instantly transported away from a host's website after 'clicking' on an advertisement and activating a hyperlink." *DDR Holdings,* 773 F.3d at 1257. This was done in the claim by serving a composite page with content based on the link that was activated to serve the page.

In contrast, claim 21 performs a process that is not part of the argued broadcast process per se, but instead identifies ads that will be put into the broadcast. Ad identification is not a technical problem, it is a marketing problem. Using an auction is a commercial solution, not a technical

solution. That this may assist with then laying out ads in a broadcast outside the scope of the claim is not pertinent to determining whether the claim itself provides a technical solution to a technical problem. A simple mathematical algorithm such as addition is equally useful in solving technical problems, but simply automating it is insufficient to make it not an abstract idea.

We are not persuaded by Appellants' argument that "there is no prior art that recognizes the advantage of using different auction models for auctioning different asset delivery options of a single spot, much less where a second auction model depends on a winning bid of a first asset delivery option." App. Br. 9. This argument conflates the abstract subject matter analysis with that of obviousness. Selection of auction models is a marketing rather than technical decision. Technical solutions may be employed, but as they are not in the claim, such is irrelevant. Basing the selection on any particular criteria, including a winning bid, is again a marketing rather than technical decision. Marketing decisions are among the more abstract types of decisions in commerce.

Claim 1 is directed to a general purpose computer programmed to perform the process of claim 21. The dependent claims are not argued separately. Thus, we agree with the Examiner that these claims are non-statutory, for the same reasons discussed above for claim 21.

Claims 1 and 21 rejected under 35 U.S.C. § 112, second paragraph, as failing to particularly point out and distinctly claim the invention

We are persuaded by Appellants' argument that the limitation of "wherein said second auctioning model is at least partially based on said

identified first winning bid of said first asset delivery option" is not indefinite. App. Br. 4–5. The Examiner construes the wherein clause as being timed to process following the determining and auctioning limitations. Final Act. 2–3. But the wherein clause describes how those limitations interact and is not an independent third step. One of ordinary skill in the computer programming arts would understand the wherein clause requires the determination of the second model to occur after identifying the first winning bid of the first asset delivery option.

We are also persuaded by Appellants' argument that the Examiner's finding that the determination is unduly broad (Final Act. 3) does not render the claim indeterminate. App. Br. 5–6. "[B]readth is not to be equated with indefiniteness." *Application of Miller*, 441 F.2d 689, 693 (CCPA 1971).

Claims 1–16, 18–32, and 59 rejected under 35 U.S.C. § 103(a) as unpatentable over Bykowsky and Sandholm

We are persuaded by Appellants' argument that neither reference describes a second auctioning model being at least partially based on an identified first winning bid. App. Br. 12; *see also* Reply Br. 9. The Examiner makes no findings as to this limitation, and we are unable to find it described in the applied art.

Claim 17 rejected under 35 U.S.C. § 103(a) as unpatentable over Bykowsky, Sandholm, and Bronnimann

Claim 17 depends from claim 1.

Claims 60–62 rejected under 35 U.S.C. § 103(a) as unpatentable over Bykowsky, Sandholm, and Siler

These claims depend from claim 1.

CONCLUSIONS OF LAW

The rejection of claims 1–32 and 59–62 under 35 U.S.C. § 101 as directed to non–statutory subject matter is proper.

The rejection of claims 1 and 21 under 35 U.S.C. § 112, second paragraph, as failing to particularly point out and distinctly claim the invention, is improper.

The rejection of claims 1–16, 18–32, and 59 under 35 U.S.C. § 103(a) as unpatentable over Bykowsky and Sandholm is improper.

The rejection of claim 17 under 35 U.S.C. § 103(a) as unpatentable over Bykowsky, Sandholm, and Bronnimann is improper.

The rejection of claims 60–62 under 35 U.S.C. § 103(a) as unpatentable over Bykowsky, Sandholm, and Siler is improper.

DECISION

The rejection of claims 1–32 and 59–62 is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2011).

AFFIRMED